STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED June 14, 2007
v	No. 266738 Eaton Circuit Court
EDMUND LOWELL FIELDS, Defendant-Appellant.	LC No. 05-020279-FC

Before: Talbot, P.J., and Cavanagh and Meter, J.J.

PER CURIAM.

Defendant appeals as of right his conviction and sentencing for second-degree murder, MCL 750.317. He was convicted of second-degree murder and possession of a firearm during the commission of a felony, MCL 770.227b, on September 30, 2005, following a jury trial and sentenced as an habitual offender, second offense, MCL 769.10, to 23 to 50 years' imprisonment, to be served consecutively to 2 years' imprisonment for the felony-firearm conviction. We affirm, but remand for correction of defendant's sentence investigation report.

Defendant argues that his conviction for second-degree murder is against the great weight of the evidence. Although he admits that he shot the victim, Deshawn Bibbs, three times, he claims that he did not act with malice, but in the heat of passion. The trial court should grant a motion for a new trial because the conviction is against the great weight of the evidence only when the evidence preponderates so heavily against the verdict that a serious miscarriage of justice would result if the verdict was allowed to stand. *People v Lemmon*, 456 Mich 625, 627, 640; 576 NW2d 129 (1998); *People v Musser*, 259 Mich App 215, 218-219; 673 NW2d 800 (2003). We will vacate a verdict only when it "does not find reasonable support in the evidence, but is more likely to be attributed to causes outside the record such as passion, prejudice, sympathy, or some extraneous influence." *People v DeLisle*, 202 Mich App 658, 661; 509 NW2d 885 (1993). We review the trial court's decision denying a motion for a new trial for an abuse of discretion. *People v Abraham*, 256 Mich App 265, 269; 662 NW2d 836 (2003). An abuse of discretion occurs when the trial court fails to select a "principled outcome." *People v Babcock*, 469 Mich 247, 269; 666 NW2d 231 (2003).

A conviction for second-degree murder requires the proof of a death, caused by an act of the defendant, who acted with malice and without justification or excuse. *People v Goecke*, 457 Mich 442, 463-464; 579 NW2d 868 (1998). Malice means that the defendant intended to kill or to inflict serious bodily harm, or intended to create or knowingly created a very high risk of

death or serious bodily harm, knowing that death or such harm would likely result from his actions. *Abraham, supra* at 269-270; *People v Herndon*, 246 Mich App 371, 386; 633 NW2d 376 (2001). The defendant need not actually desire to kill or inflict harm; the prosecution must only prove that the defendant intended to commit an act "that is in obvious disregard of life-endangering consequences." *People v Werner*, 254 Mich App 528, 531; 659 NWd2 688 (2002). Malice may be inferred from the use of a gun, a deadly weapon. *People v Fletcher*, 260 Mich App 531, 562; 679 NW2d 127 (2004).

We conclude that defendant clearly acted with malice even if he did not intend to kill Bibbs. Defendant aimed his pistol at Bibbs through the windshield and shot three times, standing within two to six feet of the car. Shooting a gun at a person at such close range clearly indicates an obvious disregard of life-endangering consequences. If defendant acted in the heat of passion, however, his actions may be "justified" and the more appropriate verdict is voluntary manslaughter. The elements of voluntary manslaughter are: (1) the defendant kills in the heat of passion; (2) the passion must be caused by an adequate provocation; and (3) there cannot be a lapse of time during which a reasonable person could control his passions. *People v Sullivan*, 231 Mich App 510, 518; 586 NW2d 578 (1998). Whether the provocation is adequate is a question of fact; the test is whether the provocation would cause a reasonable person to lose control and act of out passion rather than reason. *Id*.

Although there was some testimony to support defendants' claim that he was provoked, the evidence as a whole does not so heavily weigh against the verdict that a serious miscarriage of justice would result if the conviction for second-degree murder was allowed to stand. *Lemmon, supra* at 627. There is sufficient evidence in the record to support a verdict of second-degree murder, and there is no indication that the jury based its decision on passion or prejudice. *DeLisle, supra* at 661. The jury was instructed on voluntary manslaughter as an alternative, but apparently disbelieved defendant's claim that he did not know what he was doing when he fired the gun. We defer to the decision of the jury to discredit defendant's testimony and claim of provocation. *People v Melton*, 269 Mich App 542, 546; 711 NW2d 430 (2006), partially vacated on other grounds 271 Mich App 590 (2006). The trial court did not err when it denied defendant's motion for a new trial on the basis that the verdict was against the great weight of the evidence.

Defendant also argues that the trial court erred when it submitted the charges of first- and second-degree murder to the jury because there was insufficient evidence of malice and premeditation. As a result, the jury reached a compromise verdict of second-degree murder instead of the more appropriate verdict of voluntary manslaughter. Defendant is correct that a trial court errs if it instructs the jury regarding a charge that is unsupported by the proofs, even if he is acquitted of the charge, because a compromise verdict cannot be excluded. *People v Ray*, 56 Mich App 610, 612-613; 224 NW2d 735 (1974). A criminal charge may not be submitted to the jury unless it is sufficiently supported by the evidence as a whole. *Id.* A charge is sufficiently supported by the evidence when, from the evidence viewed in the light most favorable to the prosecution, a "rational trier of fact could reasonably conclude that all the elements of a charge were proven beyond a reasonable doubt." *People v Wolfe*, 440 Mich 508, 515; 489 NW2d 748 (1992), amended 441 Mich 1201 (1992).

First-degree murder requires an intentional killing of another that was willful, premeditated and deliberate. *People v Bowman,* 254 Mich App 142; 151; 656 NW2d 835

(2002); *People v Anderson*, 209 Mich App 527, 537; 531 NW2d 780 (1995); MCL 750.316(1)(a). "If there is no evidence from which a jury could draw a reasonable inference of premeditation, there should be no charge on first-degree murder." *Ray, supra* at 613. Premeditation requires that the defendant have time for reflection or a second look between the "initial thought and the ultimate action." *Id.* at 614. Even a few seconds may be sufficient time for a second look. *People v Tilley*, 405 Mich 38, 45; 273 NW2d 471 (1979). Deliberation requires that the act be "done in a cool state of blood" and not one that is "unreasonably inflamed or excited." *Ray, supra* at 614 n 5. Defendant must be capable of "cool reflection." *People v Harris*, 190 Mich App 652, 661; 476 NW2d 767 (1991).

After a review of the record, we conclude that there was sufficient evidence of premeditation and deliberation to submit the first-degree murder charge to the jury. During the fight, defendant stated to Bibbs "I've got something for you," referring to his gun under the hood of his car. After Bibbs released him and the fight was seemingly over, defendant picked up his car keys, *walked* over 30 feet to his car, proceeded to the hood of his car, took out the gun, and began to *walk* back around his car towards Bibbs. Defendant, although he claimed that he thought Bibbs was behind him as he went to his car, admitted that when he turned around, Bibbs was in his car. Even after he realized Bibbs was backing out of the parking space to leave, defendant did not stop. He aimed the gun at Bibbs through the windshield. When the first pull of the trigger "clicked," defendant took the time to chamber a round. He then shot three times at point blank range. From the circumstances, there was sufficient evidence of deliberation and premeditation for a rational trier of fact to conclude that all of the elements of first-degree murder were met beyond a reasonable doubt. There is no evidence of a jury compromise that would require reversal, because the higher charge was properly submitted to the jury. *People v Graves*, 458 Mich 476, 487-488; 581 NW2d 229 (1998).

Defendant also argues that he was entitled to self-defense, imperfect self-defense, and defense of others instructions. His counsel's failure to request the instructions was ineffective assistance, and he is entitled to a new trial or an evidentiary hearing under *People v Ginther*, 390 Mich 436; 212 NW2d 922 (1973). He claims that he only shot Bibbs after Bibbs' assaulted him. He feared for his life and that of his unborn child because Bibbs' threatened to kill him and the child Tameca Jackson, his girlfriend, was carrying. Defendant contends that even though counsel chose to argue provocation that mitigated the shooting to manslaughter, counsel was ineffective for failing to request the other instructions, because a defendant may assert inconsistent defenses. When reviewing a claim of ineffective assistance of counsel, this Court's review is limited to the facts contained on the record. *People v Rodriguez*, 251 Mich App 10, 38; 650 NW2d 96 (2002). "Whether a person has been denied effective assistance of counsel is a mixed question of fact and constitutional law." *People v LeBlanc*, 465 Mich 575, 579; 640 NW2d 246 (2002). This Court reviews the constitutional issue de novo and the lower court's findings of fact, if any, for clear error. *People v Grant*, 470 Mich 477, 484-485; 684 NW2d 686 (2004).

To establish a claim of ineffective assistance of counsel, defendant must show that his counsel's performance was deficient under an objective standard of reasonableness, and that, but for counsel's error, the result of the proceeding would have been different and therefore, he was denied a fair trial. *Id.* at 485-486. Defendant bears a "heavy burden" to overcome the presumption that counsel was effective, *People v Garza*, 246 Mich App 251, 255; 631 NW2d

764 (2001), and that the challenged action was sound trial strategy, *People v Tommolino*, 187 Mich App 14, 17; 466 NW2d 315 (1991). Choosing one defense over another, or choosing not to present a specific defense may be sound trial strategy, even if the choice proves to be unsuccessful. *People v LaVearn*, 448 Mich 207, 213-214, 216; 528 NW2d 721 (1995). Counsel's performance is measured against an objective standard of reasonableness and without the "harsh light of hindsight." *Bell v Cone*, 535 US 685, 702; 122 S Ct 1843; 152 L Ed 2d 914 (2002). After reviewing the record, we conclude that defendant has not overcome the presumption that counsel's failure to request the instructions was sound trial strategy.

A self-defense instruction is appropriate where the defendant was not the initial aggressor, and the evidence shows that he honestly and reasonably believed that he was in danger of either death or serious bodily harm, and that it appeared at the time to be immediately necessary to use deadly force to prevent the harm. *People v Riddle*, 467 Mich 116, 126-127, 142; 649 NW2d 30 (2002); *People v Heflin*, 434 Mich 482, 502; 456 NW2d 10 (1990). A willing participant in mutual combat is required to retreat "as far as safely possible" before using deadly force in self-defense. *Riddle, supra* at 120. A defense of others instruction is appropriate where the defendant honestly and reasonably believes that another is in danger of either death or serious bodily harm, and that it appeared at the time to be immediately necessary to use deadly force to prevent the harm to the other. *People v Kurr*, 253 Mich App 317, 321; 654 NW2d 651 (2002). "Another" may be a fetus put in danger by an assault to the mother. *Id*. An instruction on imperfect self-defense is appropriate when self-defense fails only because the defendant was the initial aggressor, but is not appropriate if the defendant makes a deliberate decision to kill his victim when it is not immediately necessary to do so. *People v Butler*, 193 Mich App 63, 67-68; 483 NW2d 430 (1992).

It is clear that defendant participated in the fight. He challenged Bibbs with "I hear you been wanting to get with me," and attempted to hit Bibbs. As a combatant, defendant had a duty to retreat and could have done so. Once he was separated from Bibbs he was able to walk back to his car without interference; he could have kept walking even if he did not have keys to drive away. Because defendant did not retreat even though he could do so safely, he is not entitled to act in self-defense, and imperfect self-defense fails as well. *Riddle, supra* at 120.

Moreover, all three defenses require that the use of deadly force was immediately necessary to prevent the harm. *People v Truong (After Remand)*, 218 Mich App 325, 337-338; 553 NW2d 692 (1996). Despite defendant's claims to the contrary, deadly force was not immediately necessary. Instead of acting in self-defense, defendant appeared to make a preemptive strike, to make sure Bibbs could not or would not hassle him again. Likewise, defense of others was not a strong defense. Jackson and her fetus were not in immediate danger of death or great bodily injury from Bibbs when defendant shot Bibbs. Jackson was not in the car with Bibbs and he could not carry out his threat to "kick that baby out of her stomach" from inside the car. Future threats are not imminent danger sufficient to support the defense instructions. *Truong, supra* at 328, 337. In light of the clear weaknesses of these defenses, counsel's failure to pursue these theories was not deficient performance, but a reasonable strategic choice. *LaVearn, supra* at 213-214.

Defendant next argues that the trial court should have given the self-defense instruction sua sponte. Defendant did not raise this issue in his motion for a new trial. We review this forfeited issue for plain error affecting substantial rights. *People v Gonzalez*, 468 Mich 636,

642-643; 664 NW2d 159 (2003). If the defendant does not request an instruction, the trial court is not required to instruct the jury on a defense if evidence to support the instruction has not been presented. *People v Mills*, 450 Mich 61, 81; 537 NW2d 909 (1995); *People v Stapf*, 155 Mich App 491, 497; 400 NW2d 656 (1986). Here, counsel did not request the instruction and defendant did not present evidence of self-defense. Defendant relied solely on the mitigating circumstances that he was provoked and acted in the heat of passion. Thus, the trial court did not have a duty to sua sponte instruct the jury on self-defense. We find that it did not plainly err by failing to do so. *Id.*

Defendant argues that the prosecutor argued several facts not in evidence during the closing argument, and that the prosecutorial misconduct denied him a fair trial. "Review of alleged prosecutorial misconduct is precluded unless the defendant timely and specifically objects, except when an objection could not have cured the error, or a failure to review the issue would result in a miscarriage of justice." *People v Callon*, 256 Mich App 312, 329; 662 NW2d 501 (2003). If defendant fails to object, and the prosecutor's misstatements could have been cured by a timely instruction, a miscarriage of justice will not be found. *People v Watson*, 245 Mich App 572, 586; 629 NW2d 411 (2001). Defendant did not object to the prosecutor's comments at trial, and concedes that any prejudicial effect of the prosecutor's misstatements could have been cured by a timely instruction. Thus, we do not find a miscarriage of justice. *Id*.

Defendant also argues that counsel's failure to object to those same "misstatements" was ineffective assistance of counsel. We disagree. A prosecutor may not make a statement of fact to the jury that is not supported by evidence presented at trial and may not argue the effect of testimony that was not entered into evidence. *People v Stanaway*, 446 Mich 643, 686; 521 NW2d 557 (1994). However, the prosecutor is free to argue all reasonable inferences that flow from the evidence as they relate to the prosecution's theory of the case. *People v Bahoda*, 448 Mich 261, 282; 531 NW2d 659 (1995).

The prosecutor's statements, except for its claim that Jackson testified that defendant spit on Bibbs, were properly supported by the evidence introduced at trial or were reasonable inferences argued from the evidence as it related to the prosecution's theory of the case that defendant committed first-degree, premeditated murder. An objection would have been a meritless position, and "[c]ounsel is not ineffective for failing 'to advocate a meritless position.'" *People v Mack*, 265 Mich App 122, 130; 695 NW2d 342 (2005), quoting *People v Snider*, 239 Mich App 393, 425; 608 NW2d 502 (2000). Moreover, counsel's failure to object to closing argument, is a "quintessential example of trial strategy." *People v Reed*, 449 Mich 375, 400; 535 NW2d 496 (1995). This Court will not substitute its judgment for that of counsel's regarding trial strategy. *Garza, supra* at 255.

Finally, defendant argues that his sentencing guidelines were scored incorrectly. Specifically he challenges the score for Offense Variables (OV) 6 and 9. Despite defendant's completely cursory briefing of this issue, we will address it. *LME v ARS*, 261 MA 273, 287 (2004). The interpretation of the statutory sentencing guidelines is a question of law that this Court reviews de novo. *People v Morson*, 471 Mich 248, 255; 685 NW2d 203 (2004). A sentencing court's scoring of points under the sentencing guidelines is reviewed for an abuse of discretion, and will be upheld as long as there is some evidence of record in support. *People v Hornsby*, 251 Mich App 462, 468; 650 NW2d 700 (2002).

Defendant challenged his score of twenty-five points for OV 6, at sentencing, arguing that ten points was more appropriate because the death occurred in a combative situation. MCL 777.36. The trial court agreed and stated it would correct the guidelines score. The copy of the sentencing information report included on appeal, however, has not been corrected. We remand for correction of the guidelines score because the error may adversely affect the calculation of defendant's parole eligibility. *People v Melton,* 271 Mich App 590, 593, 597; 722 NW2d 698 (2006).

Defendant also challenges his score of ten points for OV 9, the number of victims variable. MCL 777.39. According to defendant, no one but Bibbs was "genuinely in danger of injury or loss of life" because all three rounds penetrated the car's windshield, and Bibbs was alone in the car. He argues that speculation that the people in the store may have been in danger is insufficient to support the score; rather, some proof of actual danger is required. We disagree. Although the injury must be a physical injury, *Id.* at 594-595, any person placed in danger of an injury during the criminal episode is a victim. *Morson*, *supra* at 261-262. Jackson was in the immediate vicinity and testified that she was afraid defendant would shoot her too. The trial court did not clearly err when it determined that at least two people were at risk of injury or death when defendant fired the shots, and did not abuse its discretion when it scored OV 9 at ten points.

With properly scored guidelines, defendant's Prior Record Variable does not change from Level C, but defendant's OV level drops from 110 points and Level III to 95 points and Level II. MCL 777.61. His minimum recommended sentence range drops from 225 to 468 months to 180 to 375 months, but his sentence of 276 months is within the new range. *Id*. If a scoring error changes the minimum sentence range, and the defendant has preserved the issue for appeal, the defendant is entitled to resentencing, even if original sentence is within the new guidelines. *People v Francisco*, 474 Mich 82, 91-92; 711 NW2d 44 (2006). However, if the trial court has "clearly indicated that it would have imposed the same sentence regardless of the scoring error, and the sentence falls within the appropriate guidelines range," resentencing is not required. *Id*. at 89 n 8. The court below was clearly aware of the new guidelines' range before it pronounced sentence per the prosecutor's representations, and defendant specifically requested the court sentence him to 180 to 270 months based on the new score. We conclude that the trial court considered the "new" range when sentencing defendant; thus, a remand for resentencing is not required. *Francisco, supra* at 89.

Affirmed, but remanded for correction of defendant's sentence investigation report. We do not retain jurisdiction.

/s/ Michael J. Talbot
/s/ Mark J. Cavanagh
/s/ Patrick M. Meter